

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DIANNE KELLEY and KENNETH HANSEN,	)	No. C 07-475 MJP
	)	
Plaintiffs,	)	DECLARATION OF
v.	)	NICHOLAS J. PSYHOGEOS IN
	)	SUPPORT OF MICROSOFT'S
MICROSOFT CORPORATION, a Washington	)	MOTION TO SEAL
corporation,	)	CONFIDENTIAL DOCUMENTS
	)	
Defendant.	)	<b><i>Note on Motion Calendar:</i></b>
	)	October 5, 2007
	)	

I, NICHOLAS PSYHOGEOS, hereby declare as follows:

1. I am employed by Microsoft Corporation ("Microsoft") at our headquarters in Redmond, Washington. I have been employed by Microsoft since 1998. My current position at Microsoft is General Manager of the Worldwide OEM Programs & Policy team. I have held that position since April 2005. I am over 18 years of age. I have personal knowledge of the facts set forth herein, except as to those facts where I state that my understanding is based on information available to me as General Manager of Microsoft's Worldwide OEM Programs & Policy team.

2. In my position as General Manager of the Worldwide OEM Programs & Policy

DECLARATION OF NICHOLAS J. PSYHOGEOS  
IN SUPPORT OF MICROSOFT'S MOTION TO SEAL  
CONFIDENTIAL DOCUMENTS (NO. C07-475 MJP) – 1

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1 team, I am responsible for managing Microsoft's programs, licensing and policies with the  
 2 companies (called "original equipment manufacturers" or "OEMs") that manufacture  
 3 computers that have Microsoft operating systems and other software preinstalled on them  
 4 under one or more licenses from Microsoft or an affiliate.

5 3. I understand that the plaintiffs in this lawsuit submitted copies of the following  
 6 confidential agreements, communications and other materials with Plaintiffs' Reply in  
 7 Support of Motion to Compel Discovery and to Deem Certain Requests for Admission  
 8 "Admitted" (hereafter "Plaintiffs' Reply"):

- 9 • Excerpts of the Rule 30(b)(6) Deposition Transcript of Christine  
 10 Mullaney Sundlie in this case in which plaintiffs' counsel  
 11 questioned Ms. Mullaney Sundlie about (i) incentive discounts and  
 12 compliance with milestones under Microsoft's Market Develop-  
 ment Agreements with OEMs and (ii) terms of Microsoft's  
 Designed for Microsoft Windows and Windows Vista Logo  
 License Agreement with OEMs.
- 13 • Excerpts of Microsoft's OEM Marketing Bulletin, dated September  
 14 20, 2006, concerning the "Windows Vista Capable" program.
- 15 • Excerpts from a draft Cooperative Market Development Agreement  
 16 between Microsoft and one of our OEM partners.
- 17 • A letter, dated December 27, 2001, from Microsoft to another OEM  
 18 partner concerning incentive discounts under a Cooperative Market  
 Development Agreement between Microsoft and that OEM.
- 19 • Excerpts from a Microsoft Desktop Operating System License  
 20 Agreement for OEM Customers.

21 4. Each of these materials is, or contains information about, a commercially  
 22 sensitive business matter, and each is of significant competitive value to Microsoft. As such,  
 23 Microsoft considers these materials confidential and takes steps to keep these materials  
 24 confidential. Each of the four business documents is labeled "Confidential" on each page of  
 25 the document.

26 5. Maintaining the confidentiality of these agreements and communications with  
 27

1 our OEM partners is not simply a matter of great importance to Microsoft. The OEMs also  
2 have contractual rights to confidentiality under these agreements, and, based on information  
3 available to me as General Manager of Microsoft's Worldwide OEM Programs & Policy  
4 team, I understand that OEMs expect Microsoft to keep these matters confidential.

### 5 6 **Cooperative Market Development Agreements**

7 6. Three of the items described above relate to Microsoft's business practice of  
8 negotiating and entering into Cooperative Market Development Agreements with OEMs that  
9 are licensed to preinstall Microsoft's operating system software on the personal computers  
10 ("PCs") they manufacture and sell. Since most of Microsoft's desktop operating system  
11 software is licensed to consumers as a preinstalled component of a PC, Microsoft and the  
12 OEMs that preinstall its software have a common interest in promoting the sales of PCs that  
13 contain the software and in improving the experience of consumers who buy such PCs.

14 7. A Cooperative Market Development Agreement is a contract between Microsoft  
15 and an OEM under which the OEM can obtain specific discounts (called "incentive  
16 discounts") on the royalties it pays by successfully completing a series of technical and  
17 marketing activities (called "milestones") during a set period of time. These activities are  
18 designed to enhance end-user customer experiences by improving product quality and  
19 customer support and by promoting promising technologies.

20 8. Microsoft is required (by a consent decree with the U.S. Department of Justice)  
21 to have certain uniform terms in certain of its contracts with OEMs. However, Microsoft does  
22 not divulge the terms of those contracts (including the uniform terms) to its software competi-  
23 tors or to the public. The terms of any Cooperative Market Development Agreement between  
24 Microsoft and an OEM—including the details of the incentive discounts that the OEM can  
25 earn—are uniform among the OEMs that acquire operating system software directly from

1 Microsoft, but those terms are confidential between Microsoft and those OEMs and are not  
2 divulged to the public. In addition, the amounts of the actual discounts that an OEM's efforts  
3 earn it under the Cooperative Market Development Agreement are not divulged to other  
4 OEMs or to the public. Microsoft considers these matters very confidential.

5  
6 **Other Contracts With OEMs**

7 9. The materials submitted with Plaintiffs' Reply also contain (a) excerpts from a  
8 Microsoft Desktop Operating System License Agreement for OEM Customers and (b) deposi-  
9 tion testimony about Microsoft's Designed for Microsoft Windows and Windows Vista Logo  
10 License Agreement with OEMs. Microsoft likewise considers these contracts commercially  
11 sensitive business matters and takes steps to keep these materials confidential.

12 10. The Microsoft Desktop Operating System License Agreement for OEM  
13 Customers is the license agreement that Microsoft enters into with an OEM that authorizes the  
14 OEM to preinstall specified Microsoft operating system software on the PCs the OEM  
15 manufactures and sells. Although Microsoft is required (by a consent decree with the U.S.  
16 Department of Justice) to have certain uniform terms in this Desktop Operating System  
17 License Agreement, Microsoft does not divulge the terms of these software licensing  
18 contracts (including the uniform terms) to its software competitors or to the public.

19 11. The Designed for Microsoft Windows and Windows Vista Logo License  
20 Agreement with OEMs is a contract under which Microsoft specifies criteria under which  
21 OEMs may use particular Microsoft-created logos on or in connection with the PCs the OEMs  
22 manufacture and sell. Microsoft does not divulge the terms of this logo license agreement to  
23 its software competitors or to the public.

**The OEM Marketing Bulletin**

12. Plaintiffs have also submitted excerpts from Microsoft's OEM Marketing Bulletin, dated September 20, 2006, concerning the "Windows Vista Capable" program. This is a document that Microsoft created to explain, in detail, to its OEM partners the marketing strategy behind its "Windows Vista Capable Program" and the specific steps and guidelines Microsoft had developed to implement that program. This document was made available only to the OEM partners who were eligible to participate in the "Windows Vista Capable" program, and was provided to those OEMs under a non-disclosure agreement. A footer on each page of the document states: "Microsoft – OEM Confidential – Subject to NDA." Microsoft does not disclose this and other documents detailing its marketing strategies to its software competitors or to the public.

**Microsoft's Efforts to Maintain the  
Confidentiality of Its Commercially Sensitive Business Documents**

13. It is Microsoft's regular practice to protect certain types of information as confidential. I am familiar with how Microsoft stores and manages access to certain records relating to our relationships with OEMs. In particular, I am personally familiar with how Microsoft stores and manages access to records relating to (a) the various types of contracts we enter into with OEMs and (b) the communications we have with OEMs concerning those contracts, and, based on information available to me as General Manager of Microsoft's Worldwide OEM Programs & Policy team, I understand how Microsoft stores and manages access to records relating to (c) the marketing programs and strategies we develop for our OEM partners to consider and use. Microsoft considers this information confidential, proprietary and trade secret information of significant competitive value and exerts commercially reasonable efforts to preserve the confidential, proprietary and trade secret nature of such information.

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1           14. We exert commercially reasonable efforts to ensure that the terms of our agree-  
2 ments with our OEM partners (including those terms that are required to be uniform) are not  
3 divulged outside the relationships with our OEM partners. In addition, we exert commercially  
4 reasonable efforts to ensure that information concerning the details of each particular OEM's  
5 transactions with Microsoft—such as, for example, the actual amount of incentive discounts a  
6 particular OEM earns under a Cooperative Market Development Agreement—is not divulged  
7 to other OEMs or to the public. This information is maintained in areas not open to the public  
8 in locations protected by passwords (for online information) or locked cabinets and/or doors  
9 accessible only with company-issued keys held by those with responsibility for protecting this  
10 information. Furthermore, this information is available only to Microsoft personnel with a  
11 business need for the information and to the particular OEM to which the information  
12 pertains. Divulging this information in a public forum would create a serious and imminent  
13 threat of Microsoft's competitors misusing and gaining unfair advantage from our confidential  
14 information, and it would also harm our interests during future negotiations with OEMs.

15           15. In addition, we exert commercially reasonable steps to keep the details of  
16 specific marketing strategies that Microsoft develops for its OEM partners to consider and use  
17 in promoting the PCs they manufacture and sell that contain Microsoft software confidential  
18 and available only to our OEM partners. We do not want our software competitors to have  
19 access to these marketing strategies because we have made a significant investment of time  
20 and resources in developing the strategies and we do not want our competitors to take  
21 advantage of our efforts. Based on information available to me as General Manager of  
22 Microsoft's Worldwide OEM Programs & Policy team, I understand that this information is  
23 likewise kept confidential and is available only to Microsoft personnel with a business need  
24 for the information and to the particular OEMs who are eligible to participate in the marketing  
25 program to which the information pertains. Divulging this information in a public forum

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1 would create a serious and imminent threat of Microsoft's competitors misusing and gaining  
2 unfair advantage from our confidential information.

3  
4 **Disclosure of Microsoft's Confidential Business  
Materials Would Cause Significant Harm to Microsoft's Competitive Interests**

5 16. The public disclosure of the terms of any of Microsoft's agreements with OEMs  
6 would put Microsoft at a competitive disadvantage vis-à-vis its software competitors. If those  
7 competitors knew the terms to which we were willing to agree with an OEM partner,  
8 Microsoft's competitors could use that information in their own negotiations with OEMs. For  
9 example, a competitor knowing the terms to which Microsoft was willing to agree with an  
10 OEM partner could provide more favorable terms to that OEM or to other of our current or  
11 potential OEM partners. In that case, Microsoft could see its business with one or more  
12 OEMs decline, and it could be forced to renegotiate its agreements with one or more OEMs  
13 on less favorable terms—all to Microsoft's competitive disadvantage in the marketplace.

14 17. In addition, the public disclosure of the details of marketing strategies that  
15 Microsoft has developed for use by its OEM partners—such as the marketing strategies set  
16 out in the OEM Marketing Bulletin for the "Windows Vista Capable" program—would also  
17 put Microsoft at a competitive disadvantage vis-à-vis its software competitors. If those  
18 software competitors knew the details of marketing strategies that Microsoft had developed  
19 for use by its OEM partners, Microsoft's competitors could use that information in their own  
20 marketing programs or could structure their own marketing programs to undercut the  
21 effectiveness of the strategies Microsoft had developed—all to Microsoft's competitive  
22 disadvantage in the marketplace.

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1 18. I declare under penalty of perjury that the foregoing is true and correct.

2 EXECUTED this 1st day of October, 2007, at Redmond, Washington.

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5 Nicholas J. Psychogeos  
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